JD(ATL)—58—03
Plant City, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CORONET INDUSTRIES, INC.

and **Case 12—CA—22715**
(formerly 2—CA—35194)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 79, AFL-CIO

***Thomas W. Brudney, Esq.,* for the General Counsel.**
***Philip B. Russell, Esq. and Grant D. Petersen, Esq.,* for the Respondent.**
***Thor T. Johnson, Business Agent,* for the Charging Party.**

BENCH DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Tampa, Florida on August 7 and 8, 2003. International Brotherhood of Teamsters, Local 79, AFL-CIO ("the Union") filed the charge on January 3, 2003 and the complaint was issued on April 28, 2003. The complaint alleged that Coronet Industries, Inc., the Respondent, violated Section 8(a)(1) and (5) of the Act, since on or about December 20, 2002[1], by unilaterally failing and refusing to grant to employees represented by the Union a Christmas bonus and annual wage increase. The Respondent filed its answer to the complaint on May 13, 2003 denying the alleged unfair labor practices and raising several affirmative defenses. At the conclusion of the hearing, and after hearing closing arguments from all parties, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations, setting forth my findings of fact and conclusions of law.

For the reasons stated by me on the record at the close of the trial, I found that the Respondent had an established practice of granting employees an annual Christmas bonus in the third week of December and making annual wage adjustments effective at the beginning of January each year. The testimony and documentary evidence convinced me that the Respondent's practice was such that employees would reasonably expect these benefits to continue and that the bonus and annual wage increase were an established component of the unit employees' compensation. On December 5 and 6, a majority of the Respondent's employees in an appropriate unit voted for representation by the Union and, on December 18, the Union was certified by the Board as the exclusive Section 9(a) representative of these employees. Almost immediately thereafter, the Respondent decided, for the first time in at least six years, not to grant a Christmas bonus and not to adjust the employees' wages. There is no dispute that the Respondent made these decisions without bargaining with the newly certified

[1] All dates are in 2002 unless otherwise indicated.

Union. In reaching my conclusion that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act, I rejected the Respondent's contentions that it could not have granted either the bonus or a wage increase without committing an unfair labor practice; that the Respondent had tried to bargain with the Union but the Union had engaged in dilatory and bad faith bargaining; and that the Respondent would not have granted a bonus or a wage increase even in the absence of union activity because of financial considerations.[2] As explained more fully on the record, I based my decision primarily upon the rationale expressed by the Board in its decision in *Daily News of Los Angeles,* 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) and in subsequent cases involving alleged unilateral changes after a union's certification. *Lee's Summit Hospital,* 338 NLRB No. 116 (Mar. 20, 2003); *Burrows Paper Corp.,* 332 NLRB No. 15 (September 15, 2000); *Kurdziel Iron of Wauseon,* 327 NLRB 155 (1998), enfd. in an unpublished opinion, 208 F.3d 214 (6th Cir. 2000). See also *Waxie Sanitary Supply,* 337 NLRB No. 43 (December 20, 2001) (unilateral discontinuance of a holiday bonus violated Section 8(a)(5)) and cases cited therein.

Accordingly, I hereby certify the accuracy of the portion of the transcript, pages 382-412 as corrected,[3] containing my Bench Decision. A copy of that portion of the transcript, as corrected, is attached as "Appendix B".

Conclusions of Law

By unilaterally failing and refusing to pay a Christmas bonus in December 2002 and to grant an annual wage increase in January 2003 to its employees represented by the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The traditional remedy for the type of violation found here would require the Respondent to make its employees whole by granting them the bonus and wage increase they would have received in December 2002 and January 2003, with interest. The facts of this case make a precise determination of the amount of the bonus and wage increase that would have been granted absent the unfair labor practice somewhat difficult. Although the record established that the Respondent paid a Christmas bonus and increased its employees' wages every year at about the same time until the Union was certified, the amount of the bonus and the size of the increase varied depending on the Respondent's financial condition. As explained in further detail on the record, the fact that the Respondent lost money or had financial difficulties in a given year did not mean that neither a bonus or wage increase would be granted. These factors only affected the size of the bonus and increase.

Because the Respondent unlawfully failed and refused to afford the Union adequate notice and an opportunity to bargain about its decision not to grant these benefits this year, one can only speculate as to the amount that would have been granted had the Respondent

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[2] Although the Respondent asserted a *Wright Line,* 251 NLRB 1083 (1980), affirmative defense, the complaint did not allege that the Respondent's conduct violated Section 8(a)(3) of the Act.

[3] I have corrected the transcript pages containing my bench decision and the corrections are as reflected in attached Appendix C.

complied with its obligations under the Act. Rather than arbitrarily fix an amount for the bonus and wage increase, I recommended in my bench decision that the Respondent be ordered to bargain with the Union, in good faith, as to the amount of the bonus and wage increase and to implement whatever amount was agreed to retroactive to December 20 for the bonus and January 1, 2003 for the wage increase. This is what the Act required the Respondent to do in the first place. If the parties are unable to reach an agreement after good faith bargaining, then the Respondent would be free to implement its final offer to the Union. Any amounts paid to the employees as a result of the parties' bargaining on this subject would include interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The General Counsel, in his closing argument, requested as a further remedy for the Respondent's unfair labor practices that the Union's certification year be extended under the Board's decision in *Mar-Jac Poultry,* 136 NLRB 785 (1962). I agree that, under the circumstances here, where the Respondent's unilateral action prevented the parties from engaging in any meaningful collective-bargaining for a substantial period of time, extension of the Union's certification year is necessary to fully remedy the Respondent's unlawful conduct and to afford the employees the full benefit of the representation they chose in the December 2002 election. Accordingly, I recommend that the initial period of the Union's certification be construed to run from the date the Respondent begins to negotiate in good faith with the Union regarding the unlawfully withheld bonus and wage increase.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Coronet Industries, Inc., Plant City, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the wages and other compensation of its employees in the unit described below without first notifying the Union and affording it a meaningful opportunity to bargain regarding the proposed changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, mechanics, machinists, plant clerical employees, laborers, operators,

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shipping/receiving and lab tech employees employed by the Respondent at its Plant City, Florida facility, excluding office clerical employees, guards and supervisors as defined in the Act and all other employees.

(b) Bargain with the Union, in good faith to agreement or impasse, regarding the amount of the Christmas bonus that would have been paid in December 2002 and the amount of annual wage increase that would have been paid in January 2003.

(c) Make employees in the above unit whole for the Christmas bonus and wage increase that was withheld by paying them, with interest, the amounts established as a result of the bargaining described above.

(d) Within 14 days after service by the Region, post at its facility in Plant City, Florida copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT make unilateral changes to your wages and compensation by withholding your annual Christmas bonuses and annual wage increases without affording International Brotherhood of Teamsters, Local 79, AFL-CIO (the Union) notice and an opportunity to bargain regarding any proposed changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees, mechanics, machinists, plant clerical employees, laborers, operators, shipping/receiving and lab tech employees employed at our Plant City, Florida facility, excluding office clerical employees, guards and supervisors as defined in the Act and all other employees.

WE WILL bargain with the Union in good faith, to agreement or impasse, regarding the amount of the 2002 Christmas bonus and January 2003 wage increase that you would have received.

WE WILL make you whole by paying you a Christmas bonus in the amount established through bargaining, with interest, retroactive to December 2002 and by granting any wage increase established through bargaining retroactive to January 1, 2003, with interest.

CORONET INDUSTRIES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602-5824

(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.

APPENDIX B

JUDGE MARCIONESE: On the record.

Okay. Now, having heard all the evidence in the case and I have reviewed the documents that have been offered into evidence, and as indicated previously, although the case is not, I would say, the simplest case I have seen, there are certainly some very difficult issues, I still think that a bench decision would be appropriate in this, in this case.

And, particularly, where the parties seemed to have stalled negotiations and some expedition in resolution of this issue might help to spur the parties to continue with whatever bargaining there may still be to do out there, I am going to issue my decision from the bench, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Now, under the Board's Rules and Regulations, I have to essentially, in my bench decision, cover many of the same areas that I would be required to cover in a written decision. So I will make my findings of fact, as I would if I were writing a decision.

Now, the formal papers in this case establish that the union filed the instant charge on January 3rd, 2003. The Respondent was served with a copy on January 8th. And that based upon that charge, the Regional Director for Region 12, acting on behalf of the General Counsel, issued a complaint and notice of hearing on April the 28th of 2003.

Now, in that complaint and notice of hearing, essentially, there were two unfair labor practices alleged, that the Respondent engaged in a unilateral act when, on or about December 20th, 2002, it failed and refused to pay unit employees a Christmas bonus for 2002, notwithstanding its past practice of paying bonuses.

And that since on or about December 20th, 2002, Respondent failed and refused to grant the unit employees annual wage increases, notwithstanding its past practice of granting such wage increases to those employees. And those -- that conduct is alleged to be in violation of Section 8(a)(1) and (5) of the Act.

Now, the Respondent filed its answer to the complaint on May 13, 2003. And, in that answer, it essentially denied the unfair labor practices that were alleged, and raised a number of

affirmative defenses, which it has also pursued in this hearing, essentially amounting to issues as to whether or not payment of the Christmas gifts and wage increases were not terms and conditions of employment, that the union waived any right, and that the Respondent had not made unilateral changes.

Now, this hearing opened yesterday, and all parties have had an opportunity to present whatever witnesses they would like, whatever documentary evidence that they would like in support of their respective positions. I have now heard closing arguments.

The Respondent has admitted in its answer and I will find that it is an employer engaged in commerce, a Delaware corporation, and with its principal office and place of business in Plant City, Florida, where it is engaged in the manufacture of deflourinated phosphates used as a mineral in food supplements for poultry and other livestock. And that, annually, the Respondent purchases and receives at that facility, in excess of $50,000, directly from points outside the state. And that, and that based on those facts, it is an employer engaged in commerce.

And that the union is a labor organization within the meaning of Section 2(5) of the Act.

Now, the undisputed evidence in the record also shows that on December 5th and 6th of 2002, the Board conducted an election, at which a majority of the employees, in an appropriate unit, designated the Charging Party union, International Brotherhood of Teamsters, Local 79, to be their collective bargaining representative.

And the Respondent admits that the unit, as defined in the complaint, namely all full-time and regular part-time production and maintenance employees, mechanics, machinists, plant clerical employees, laborers, operators, shipping/receiving, and lab tech employees, employed by the Respondent at its Plant City, Florida, facility, excluding office clerical employees, guards, and supervisors, as defined in the Act, and all other employees, that that is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Now, as a result of that election and the designation of a majority of the employees, a certification of representative issued on December 18th, 2002, and the certification is in evidence.

Now, there is no dispute, at least in terms of my evaluation of the evidence, that the Respondent has, in the past, given its employees money at Christmastime each year, at least since December of 1997. And, and that that is usually given at around the same time each year, generally, the third week of the month, on or about a payday before Christmas.

Now, the amount, the record -- it also seems undisputed that, although it is given every year and at the same time each year, the amount has varied from year to year. And Respondent's Exhibit 41, which I know is here, somewhere -- Respondent's Exhibit 41 is a summary that was prepared for purposes of the litigation, based upon company records, and there is no dispute as to the accuracy of the summary, which does show that the amounts have fluctuated from a high of 4 percent in 1997, down to 2.2 percent in the last year preceding certification in 2002. And that, in fact -- I'm sorry, let me correct myself. I was looking at the wage increase.

The Christmas gifts started out in '98 and '99, at 2 weeks, went to 1.2 weeks, 3/4 of a week, and then 1/2 a week. So, they have not only varied, but they have declined over time.

But, in any event, it is clear, though, that the -- although the amounts have varied, the amounts are based upon an employee's wages, since it is determined based on an employee's weekly wage rate, rather than just being, say, an arbitrary sum of money that is given to every employee in the same amount, and different from a typical Christmas gift in the form of, perhaps, a gift certificate, or a ham or a turkey. This does seem to be tied into the amount of wages the employee -- each employee makes. So it does have some correlation to the employee's actual work performance and, and work wage rate.

It is also undisputed that each year, in or about the beginning of January, since 1997, at least, the Respondent has granted across the board increases to all of the employees in the bargaining unit. It appears, although it is not clear from the record, they did it to all employees in the company, at the same time. Let me just -- sorry about that.

Okay. But, again, as with the Christmas bonus, although it is given at the same time each year to all employees, the amount has varied. And, again, that was the figures I was

quoting previously. The summary and the documents show from 4 percent down to 2.2 percent in the last year before the certification.

And, again, as with the Christmas bonus, it does show basically a decline, except in one year, 2000 to 2001, when it went from 3 percent to 3.1 percent. But, essentially, the trend is a declining trend.

In both cases, although Mr. Burgess, himself, testified that there is no, no actual formula for determining the amount of increase, it does appear from his testimony and the other documents in the record that the amounts that employees received, and whether they do receive a Christmas gift or bonus and a wage increase, is somehow tied into the performance of the company.

I will also note that generally, as well, when the wage increases are granted and the bonuses are given to the employees, the announcements that usually accompany them make reference to the performance of the company and the employees' efforts in regard to their work for the company.

Now, there is also undisputed that this past December, which happens to coincide with the election and the union's certification, that no bonus or gift was given to any unit employees, or apparently to anyone else, as best I can determine from the record, and no wage increase was given to the employees in, in January.

Now, so the first issue I need to determine in this case is whether or not the grant of a gift or bonus, however it is characterized, each year at Christmastime, and the annual across the board wage increase, is a condition of employment. Because, if it is not a condition of employment, then there is no obligation to bargain and the Respondent is free to do whatever it would like with that.

Now, the cases, there's quite a few cases on that issue. This is a matter that's come before the Board many times. But, the lead case that the Board currently seems to be going by is the Daily News of Los Angeles, and I will cite that case, it's 315 NLRB #158. And I think, if I am correct, that has been enforced by the District of Columbia Circuit at 73 F.3d 406 (D.C.

Circuit 1996), and cert. denied by the Supreme Court at 519 U.S. 1090 (1997).

Now, the Board, in that case, went through quite a lengthy explanation of its past holdings in the area of wage increases and unilateral changes in that area. And in order to satisfy the Court of Appeals, I won't quote from the Board's decision.

Merely, but I will indicate that what the Board has suggested in Daily News is -- but that the key factor appears to be whether employees have a reasonable expectation that a benefit will continue from year to year.

I also cite, with respect to the Christmas bonus, Waxie Sanitary Supply, a case at 337 NLRB #43, December 20th, 2001, where the Board reversed the Administrative Law Judge and found that the discontinuance of a holiday bonus was a unilateral change, in violation of Section 8(a)(5), stating that a holiday bonus is a mandatory bargaining subject, that the employer's conduct raises the employees' reasonable expectation that the bonus will be paid.

Citing a number of -- a couple of other cases, Sykel Enterprises, Incorporated, S-Y-K-E-L, 324 NLRB #1123, at 1124, 1125, and Laredo Coca-Cola Bottling Company, 241 NLRB #167, at 173, 174, a 1979 case, enforced 613 F.2d 1338 (5th Circuit 1989), cert. denied by the Supreme Court at 449 U.S. 889 (1980).

And in that case, the Board indicated, in discussing the history of dealing with Christmas bonuses, that it has been found to be a term and condition of employment, even when the fact whether the bonus will be paid or the amount of the bonus is dependent on the employer's profit, then that doesn't make a difference in determining whether it is a term and condition of employment. And that it can be a term and condition of employment, even if it is not based on an employee's individual performance.

Here, I think, based on the record evidence, that indicates a regular pattern of granting both a bonus and a wage increase at the same time each year, for a period going back at least to 1997, would give employees a reasonable cause to believe that each year, at that time, the Respondent would make an adjustment to their wages and that they would be rewarded for their efforts through some kind of a bonus at Christmas.

In further support of my finding in that regard, I will also cite Kurdziel Iron of Wauseon, it's K-U-R-D-Z-I-E-L, 327 NLRB #155. And that has been enforced, I think, in an unpublished opinion by the 6th Circuit at 208 F.3d 214 in 2000. Another case that I am relying upon is Burrows Paper Corporation, B-U-R-R-O-W-S, 332 NLRB #15, a September 15th, 2000, case. And Lee's Summit Hospital, 338 NLRB #116, a March 20th, 2003, case.

And I will also note that the case that the Respondent cites as being on point, Stone Container Corporation, at 313 NLRB #336, did not hold that the wage adjustment in that case, that was given every year in April, was not a term and condition of employment. It dismissed that case on its other finding that the respondent had satisfied whatever obligation it had to the union. But, it certainly does not stand for a proposition that an annual across the board wage increase, similar to the type at issue here, is not a condition of employment.

Now, having reached the conclusion that the employees did have a reasonable expectation that, in December of 2002, that they would receive some bonus, and also, too, in terms of the reasonable expectation, another factor is that notwithstanding the fact that the Respondent had had a difficult year and as the evidence the Respondent proffered indicates employees would have been aware of the difficulties the Respondent was facing in 2002, in the past, Respondent, in its announcements to the employees regarding Christmas bonuses, had often referred to the difficult year it was having, the difficult times it was having.

But, yet, nonetheless, determined and notified the employees that it was giving them a bonus to reward them for their efforts in the prior year, and that that would give the employees reason to believe that that bonus would continue year to year, even in times that were difficult, particularly, certainly, the employees are not privy to all of the details that were presented to me in this case.

And the way the Board looks at these types of bonuses and/or gifts and wage increases, it's from what an employee reasonably would expect, not necessarily what Respondent may be privy to in evaluating its own books and records.

Now, having concluded that the Christmas bonus and the wage increase were terms and

conditions of employment, essentially, what that means is that once the union had been designated by a majority of the employees and was now their collective bargaining representative, the Respondent was not free to change those terms and conditions of employment without affording the union notice and an opportunity to bargain.

And, of course, the seminal case for that proposition is NLRB v. Katz, the Supreme Court's decision, 369 U.S. 736, a 1962 decision, which is quoted from and relied upon extensively by the Board in Daily News of Los Angeles and certainly is the leading case in determining what an employer's obligation is.

Katz, as well as other cases where the Board has addressed the issue of unilateral changes, stand for the proposition that once an employer's employees have designated a union to be their bargaining representative, an employer is no longer free to act unilaterally with respect to matters that are mandatory subjects of bargaining, and that includes wages.

And, certainly, the Christmas bonuses, in this case, because of the regularity of their payment and the expectation of the employees, and the annual across the board adjustment, are part of the Respondent's compensation system.

I think despite the evidence with respect to the amount of discretion the Respondent had, it's clear that Respondent, itself, treated its annual determination as to a wage increase and a Christmas bonus as part of the compensation system for its employees. There certainly was no other means by which employees could receive a wage increase.

So, certainly, that being the matter, once the union has been designated, the employer can no longer act unilaterally and, in the exercise of its discretion, would be required to, at a minimum, afford the union notice of its intention and its decision, and an opportunity to engage in bargaining before implementing any changes.

Now, then that takes us to the next question, which is did the Employer satisfy its obligation here. And that, I think, is really the most difficult issue that I've been wrestling with during the course of the hearing.

In this case, the General Counsel offered the testimony of Mr. Johnson, the union

business agent, indicating that he first learned about the nonpayment of the bonus and the wage increase from employees, on or about December 20th. And that he then placed a phone call to Mr. Russell, counsel for the Respondent, who had been designated to handle the negotiations.

Mr. Dean, the employee witness, indicated that he learned he was not getting a bonus on the date he did not receive it, which would presumably have been around that December 20th date, shortly before Christmas. And his testimony was that he probably called the union about not getting the bonus in December, but his testimony was not all that conclusive in terms of his recollection of having made such a call.

Now, Mr. Johnson testified that he called counsel, Mr. Russell, on the 20th, upon receiving reports from employees, and he questioned the nonpayment of the bonus and the wage increase. And he indicated that Mr. Russell told him that it was subject to negotiation and the Respondent can't afford it.

Mr. Johnson indicated he then accused Mr. Russell of the Respondent having committed an unfair labor practice, testified that he discussed back and forth their respective positions, and neither party changing their view.

But, at no point, it appears from his testimony, did he make a formal request that the Employer actually bargain about the failure to pay the bonus or failure to grant the wage increase.

And, also, it is not all together clear from the testimony of Mr. Johnson and Mr. Dean that, as of December 20th, he would have been aware that the employees were not going to be getting a wage increase in January.

Mr. Dean, in his testimony, indicated that he knew he wasn't getting the bonus when he did not get it. And, if I recall his testimony, he just assumed or it was the rumor or the gossip in the plant that employees would also not be getting their January wage increase. Whether or not he communicated that to Mr. Johnson is not entirely clear.

But, in any event, even assuming Mr. Johnson did not learn from the employees on

December 20th that the Respondent was not going to pay a Christmas bonus or grant a wage increase, the Respondent did, in fact, by letter, inform him of this fact. And this letter is one that the Respondent relies upon primarily in its defense that it satisfied whatever obligations that it had.

Now, I will note that the letter that is in evidence before me indicates, at least from the heading, that it appears to have been faxed to the union at 6:02 p.m. on December 20th, which I think the parties have indicated would be a Friday. And so, certainly, by that time, it's unclear that Mr. Johnson would even have received that notification on the 20th, if the office had already closed by 6:02.

On December 23rd, there is in the record a letter that Mr. Johnson wrote to Mr. Russell in response. So, clearly, by Monday, the 23rd, he had received that letter on the 20th. And in his December 23rd letter, Mr. Johnson refers to a conversation this date with Mr. Russell. From that, I will find that the conversation that Mr. Johnson testified he believed occurred on December 20th, actually occurred on December 23rd, before he drafted his response and after he had received Mr. Russell's letter of December 20th.

So, essentially, from that, it appears and I would find that the earliest the union had notice that the Respondent was not going to pay a Christmas bonus to the employees or a wage increase was Monday, December 23, 2002.

Now, by that time, the Respondent already had not paid the Christmas bonus at the time it would normally have been expected. But, the wage increases generally were implemented at the beginning of January, so there was still a period of time before the increase for the union to take action.

Now, Mr. Johnson did take action. He wrote a letter on the 23rd. In the letter, he protested the failure to give the Christmas bonus, but conceded on the witness stand that there was no mention of the wage increase in his letter, and indicated that that was an oversight on his part. He protested the failure to pay the Christmas bonus, and indicated he perceived that to be an unfair labor practice, and indicated that he would be filing a charge to that effect.

And he also, in that letter, demanded that the Respondent maintain the status quo. And there is no dispute that soon thereafter, on January 3rd, the union, in fact, did file that unfair labor practice charge, which is what has led us to this hearing.

Now, after January 3rd, after the December 23rd letter, there appears to have been very little communication between the parties until January 17th. Now, Mr. Johnson testified that there may have been communications before -- between December 23rd and January 17th on the subject of setting up negotiations for a contract.

And in that regard, he is somewhat corroborated by the letter from Mr. Russell, himself, on December 20th, which indicates he wants to set up some meetings for collective bargaining. And, I believe, in that letter, at the end of the letter, with that, he says we would like to suggest late January or early February for our first negotiating session.

So, Respondent, in its communications with the union, is indicating, apparently, no need for haste in negotiations, at that point in time, because it's willing to wait over a month before beginning negotiations with the union.

Now, as I indicated before, other than perhaps conversations back and forth to try to schedule that first meeting, which apparently was ultimately scheduled for January 30th, there was no other communication until January 17th, when the union receives another letter from the Respondent, which asked for an emergency negotiation to discuss the need for layoffs because of the Respondent's dire financial situation.

And in that letter, Mr. Russell tells the union that he's offering to discuss the need for a layoff, in the same manner as he had offered to discuss the Christmas bonus and the wage increase in the earlier letter.

After January 17th, the parties did have some additional oral telephone communications. There was also correspondence in the record over the scheduling of the emergency session. There was also conversation and discussion about the union's request to tour the plant, the mechanics of meetings, who was going to pay for the meeting place where they would be held. But, there doesn't appear to have been any discussion after December 23rd about either the

Christmas bonus or the January wage increase.

The only reference that I could find to either the bonus or the wage increase was in a letter that Mr. Johnson sent to Mr. Russell on January 22nd, in which he referred to the Respondent's having failed to maintain its policy of paying the bonus and a wage increase, as in contrast to the Respondent's insistence to the union that certain policies that employees must adhere to. And, essentially, indicating that this was a form of sort of double-speaking on the part of the Employer, on the one hand, insisting that employees adhere to policy, while not adhering to them, themselves.

But, again, there is no mention in that correspondence or any of the other correspondence of bargaining regarding either subject.

The parties did have a meeting on January 24th. But that meeting, at least from the testimony of Mr. Johnson, and, again, I do not have the benefit of any contradictory testimony from Mr. Russell, who served as counsel and would have been in a difficult position if he had taken the stand, but no other witnesses were called to contradict it, but Mr. Johnson's testimony indicated that the January 24th meeting was consumed almost entirely with discussing the Respondent's demand or need for an immediate layoff in order to satisfy its economic difficulties and discussing the mechanics of that layoff.

The parties did have a formal negotiation session on January 30th. But, again, Mr. Johnson testified, without contradiction, that the majority of time at that meeting was spent discussing the Respondent's proposals for quite an extensive set of ground rules for the conduct of future negotiations.

One of those ground rules, Item 8(a), does refer to the Christmas bonus and the wage increase, by indicating that one of the first items for discussion in negotiations would be continuing discussions regarding the dire economic financial situation as it particularly relates to layoff and inability to grant wage increase and bonuses.

And in the margin, Mr. Johnson had indicated okay, suggesting a willingness that that be a topic of negotiation between the parties. But, apparently, they didn't get to discussing that, at

that meeting, because Mr. Johnson testified, again without dispute, that he indicated at the meeting, since Respondent had mentioned it in its proposal for ground rules, he asked the Respondent for a proposal, what they were willing to pay the employees. And the Respondent indicated it would bargain over that in the future.

At that same meeting, Mr. Johnson gave the Respondent an information request, which, while requesting a great deal of information, did not request any financial data that would back up the Respondent's claim of an inability to pay either the bonus or a wage increase in January. And did not make any request for specific information regarding the wage rates of employees; although, there was a request for information regarding bonuses that employees received.

And as best that I can determine from the record here, there have been, other than perhaps settlement discussions that may have taken place, which under the federal rules of evidence I cannot consider, there have been no further communications or negotiations over either the wage increase or the Christmas bonus, or any other terms and conditions of employment since January 30th.

Now, Mr. Johnson testified, without contradiction, that he didn't receive the information in response to his request until July, basically a month ago. But, there is also no evidence that there was any sort of follow-up in the interim almost five-month period with respect to where the information was that was requested and when the parties were going to get back to the bargaining table, and sit down, and discuss it.

Now, one of the cases cited by the General Counsel, and also discussed by the Board in Stone Container, is the RBE -- let me find my notes here, RBE Electronics of S.D., 320 NLRB #80, a 1995 decision where the Board essentially discussed what the general rule was when parties are in negotiations and an employer proposes making a change in terms or conditions of employment.

Now, I am not clear to what extent RBE Electronics would apply where negotiations have not even commenced. Most of the cases that I've found dealing with that, citing RBE Electronics and its precedent, Bottomline, involve proposed changes in the midst of actual

bargaining, not before bargaining had even begun.

But, it certainly appears to me that the same rationale for supporting the Board's holding in RBE Electronics -- apply where a union has been certified and the parties are in the process of beginning negotiations, as would apply when the negotiations are under way.

In RBE Electronics of South Dakota, the Board said that an employer confronted with an economic emergency, compelling prompt action short of the type that it described in Bottomline, that relieves the obligation to bargain entirely, that it has one of these lesser compelling economic emergencies, that the employer would satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain over the particular matter.

Bargaining in good faith, in such time sensitive circumstances, need not be protracted, and the employer could proceed to implementation of the particular matter after reaching impasse on the matter or after a waiver of bargaining by the union and find shelter in this exception. The Board prescribed that an employer must demonstrate not only that the proposed change was compelled, but also that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable.

And the Board has indicated, in subsequent cases, that in essence, well, time is of the essence is the phrase the Board uses.

Here, Respondent does rely on an economic exigency defense. But it doesn't appear, from the evidence that I heard from Mr. Hiers or Mr. Burgess, that it is the type of economic exigency that the Board had in mind or that the Respondent has satisfied its burden in that regard.

Certainly, the factors that were cited by the Respondent in terms of not paying a Christmas bonus or adjusting employees' wages in January were not something that had immediately arisen in December or after the union was certified. Mr. Hiers indicated that the volatility in the market has existed at least since 1999, that the downward pricing pressures from increased capacity and declining demand was not something that had just arisen in 2002, but apparently had been going on for several years. Other competitors had been adding capacity.

This wasn't something that was brand new in 2002.

And, from his description, and a very educational, actually, testimony regarding the industry is that there has been, over the years, a declining demand for the types of products that Respondent manufactures and sells, the principle product, which is the component of animal feed.

So, certainly, there was nothing that -- and even the loss of the major contracts with Tyson that occurred in June, that was six months before the union received -- almost six months before the union received its certification, and would have been in a position to -- the parties would have been in a position to begin bargaining.

Mr. Burgess testified that he and Mr. Nagashima, I think it is, were aware, as early as July, that it might not be able to pay the Christmas bonus or adjust employees wages in January because of the loss of a major customer and the other competitive pressures that the Respondent was under. So, there certainly didn't seem that time was of the essence in December.

Now, with respect to the calendar which Mr. Russell indicated is what made this situation exigent, while it is true that the final decision apparently was made about the time that the bonuses would have been paid and shortly before pay adjustments would have been implemented, that calendar was not totally in -- Mr. Burgess indicated that the budgeting process was ongoing.

Respondent, while it had come up with preliminary budgets and had had budget reviews, October, November, into December, did not finalize its budget for 2002 until late January or February. So, certainly, there was time for the Respondent and the union to have sat down and negotiated maybe perhaps the Christmas bonus would have been a retroactive benefit, but certainly the wage increase, there was time for the parties to have negotiated that before the Respondent's budget for 2003 was finalized in late January or early February.

So, I do not find that the Respondent has satisfied its heavy burden of establishing the type of economic exigency that would have compelled prompt action, as the Board envisioned

in RBE Electronics of South Dakota.

And that brings us to the second defense raised by the Respondent, which is the issue of whether or not the Respondent's unilateral action is excused by dilatory tactics engaged in by the union or, in essence, a waiver. And the main case on that point would seem to be the Stone Container Corporation case, which is 313 NLRB #22.

In that case, which does have some similarities to this case, the parties were in the midst of negotiation at the time when the employer would normally have been granting an annual across the board wage increase, as is similar to the case, here, although the parties had not yet begun bargaining.

In that case, the union indicated at a meeting that it wanted to discuss the increase. And the Respondent then stated that it would have a proposal. And, in fact, made a proposal, in essence, of not paying any wage increase in that year.

The union had also informed the Respondent that it wouldn't protest, if the Respondent did grant an increase in accordance with this practice and at the same time that it had done in the past. The parties had actually had a meeting and had discussed the increase.

And I think there had even been some, yes, the Board found that the respondent had even conducted an annual wage and benefits survey, which it would normally have done in order to determine whether an increase would have been given. And that despite that, when respondent said, having conducted that survey, it had decided that it would not be granting an increase, the union did not pursue the matter further. And the parties, instead, continued with negotiations over the general subject of wages. And the union made no counter proposal concerning the wage increase.

Now, in this case, had the parties ever actually discussed the increase, I would find Stone Container Corporation more on point. In this case, it appears that from the time the union was presented with notice that the Respondent was not going to give either a Christmas bonus or a wage increase, there essentially was no discussion.

Essentially, now the difficult issue for me in deciding this case is who is responsible for

that. Was it the union, that there was no negotiation because the union did not protect its rights by pursuing an opportunity for meaningful bargaining that the Respondent had presented to it? Or was it the Respondent that foreclosed meaningful bargaining by, in essence, presenting the union with what General Counsel and the Board characterize in a number of cases as a fait accompli.

And in reaching a resolution of that issue, I will look to the communication from the Respondent to the union on December 20th. In that communication, in which the union was informed of the Respondent's decision not to grant either Christmas bonus or the general wage increase.

Mr. Russell notified the union that there were two reasons. "First, it would not be appropriate for the company to grant either, as both items are subject to negotiations with the union. Second, in any event, the company cannot afford either one, given its apparent financial situation." And the letter then ends with a paragraph in which the Respondent suggests late January or early February for the first negotiating session.

Now, Respondent indicates that this is, in essence, an indication of its willingness to bargain about the subject. My reading of the letter is that it is not. One the one hand, while saying that the Christmas bonus and the wage increase are subject to negotiation with the union, the Respondent says, "in any event, the company cannot afford either one", which suggests and would lead the union to reasonably conclude that even if it requested bargaining, at that time, it would be futile, because the Respondent had no intention of granting either benefit because of economic conditions. And, certainly, by the time the union received notice as to the Christmas bonus, that change had already been implemented.

The Board has historically found that when a union receives notice after the fact, that that is a fait accompli and bargaining would be futile from that point, because generally, what is it, once the barn door is closed or whatever, it is very difficult to reopen it and get the change undone.

And particularly here, when we are talking about a subject like a Christmas bonus, once

Christmas had come and gone, and the bonus was not paid, it would be almost meaningless to then attempt to bargain with the Respondent to grant a Christmas bonus.

So, having considered all the evidence, considering the Board's case law on the issue of a waiver, and noting how the Board, and with approval of the Supreme Court, indicates that waivers by unions are not to be inferred lightly, but a union's waiver of its statutory bargaining rights must be clear and unmistakable, and that the burden is upon the party asserting waiver, I cannot find, under the circumstances here, particularly the manner in which the union was informed of the changes and the timing of it, that the union, in fact, waived its right to bargain about either subject.

That being the case, Respondent's unilaterally failing to grant a Christmas bonus in December of 2002, and failing to grant an annual across the board wage adjustment in January of 2003 is a unilateral change in violation of Section 8(a)(1) and (5) of the Act, and I so find.

Now, that doesn't mean that I haven't considered the extensive evidence that was presented by Mr. Hiers and Mr. Burgess regarding the company's financial condition, and the fact that it had lost a significant amount of money in the prior year, and that it expected and projected an even greater loss in the coming year. But, those types of factors do not excuse an employer's unilateral action. Those merely indicate perhaps the constraints that the union and the employer would have been faced with, had they, in fact, sat down and bargained meaningfully about the subject.

Now, that then leads me to having found that the Respondent, in fact, committed an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint, leads me to consider a remedy.

Now, as I questioned General Counsel, one of the things that was troubling me throughout this hearing is that even if I were to agree that the bonus and the wage increase were a term and condition of employment, and that the Respondent had made a unilateral change by failing to continue its practice of giving a bonus and a wage adjustment at that time of the year, what would the remedy be?

The evidence in the record indicates that the Respondent had provided differing amounts over the years and the amounts had not always been tied -- there is no direct correlation between the company's financial performance and the amount that was given to the employees. Mr. Burgess, himself, indicated there was no formula that the Respondent applied in coming up with that, with the amount that it gave each year.

But, nevertheless, despite that, the Respondent did give increases and bonuses, even in years when it had significant losses.

I was persuaded by General Counsel's argument that, perhaps, an appropriate remedy in this case, rather than I, as the Administrative Law Judge, or the Board fixing an amount that the Respondent would have to grant to the employees retroactively, in light of the usual discretion that the Respondent exercised in determining the amount of the increase and bonus, that the most appropriate result here would be to require the parties to bargain over the amount.

And whatever amount is agreed to would then be given to the employees retroactively. The Christmas bonus would be effective as of December 19th or 20th, whatever the Thursday before Christmas was in 2002, with interest accruing since that date. And the wage increase would be retroactive to January 1st of this year, with interest accruing.

And that the parties, essentially, would then be required to meet and bargain in good faith on those two subjects, and place any agreement that they reach in writing. And the Respondent would implement it.

And, again, if the parties are unable to reach an agreement, after meaningful bargaining in good faith on both sides, then the parties would be at impasse. And whatever Respondent's last proposal on those subjects, Respondent would be free to implement.

And in evaluating this case, too, I have also considered, since, after all, any 8(a)(5) allegation, although in Katz the Supreme Court suggested that a unilateral change is a refusal to bargain, in fact, almost a per se violation, considerations of good faith are relevant to determining and balancing.

Certainly, here, when faced with a choice between whether the evidence supports a

finding that the union engaged in dilatory tactics and avoided bargaining, or whether the Respondent had indicated a willingness to engage in bargaining, I have considered the correspondence between the parties and what actually transpired in the two bargaining sessions that were held.

And it appears to me that the Respondent did not approach the negotiations in the spirit of good faith that the Act would require. It seemed to me, other than wanting to reach a quick and hasty resolution on the issue of layoffs, Respondent was not in a hurry to bargain about other terms and conditions of employment, willing to wait until the end of January or February to even begin contract negotiations.

And even when the parties had their first bargaining session, a considerable amount of time seemed to have been spent discussing ground rules, some of which did not certainly seem to indicate a willingness to seriously discuss terms and conditions of employment.

Certainly, I have considered that in assessing the relative good faith of the parties and in making my determination as to whether or not the union can be found to have engaged in dilatory tactics that would have excused any unilateral changes on the part of the Respondent.

All right, anything else? All right, I've made my decision. Under the Board's rules and regulations, when there is a bench decision, what I am required to do is, upon receipt of the transcript, and I think it is either ten days or two weeks, I'm not sure how much time the reporting service has to furnish a copy of the transcript to me, but promptly upon receipt of that transcript, I then must issue a written decision, certifying the transcript pages that contain the bench decision, supplementing it or correcting it to the extent I may feel necessary, after having reviewed the transcript, and then serve that upon all of the parties, in the same manner as any decision would be served.

Upon receipt of my decision and certification of the bench decision, the parties are referred to the Board's rules and regulations with respect to their rights to file exceptions, and the procedures for doing so. The parties have an automatic exception to all of my rulings here at the hearing, even if they did not perfect it. You can raise those again in any briefs you wish to

file to the Board, as well as to any findings or conclusions that I have made in the course of my bench decision.

Anything else before we adjourn?

MR. PETERSEN: No, Your Honor.

MR. BRUDNEY: No.

JUDGE MARCIONESE: All right. Okay, you have my decision. Hopefully, the parties will consider it and evaluating it in terms of where they go from here.

APPENDIX C

Page(s)	Line(s)	Delete	Insert
383	10	rule and regulation	Rules and Regulations
384	9	July 10, 2003	May 13, 2003
384	12	claims	payment
390	5	depended	dependent
392	17	That	
392	19	employee/employees	employer's employees
392	20	employee	employer
394	24	did get	did not get
396	5	December 20th (sic) of	December 23
399	13	Although, it is	
400	3	the union	Respondent
400	8	regard	regarding
402	10	basis	cases
402	23	increases	increased
403	21	to get to exigency	situation exigent
406	3	nothing special	no negotiation
406	15		" [before] First
406	18		[close quote after] situation
406	25		" [before] In
407	1		[close quote after] one
407	21	likely	lightly